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No. 84-53

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNIVERSITY OF NEW MEXICO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Eleventh Amendment bars recovery of damages from the State of New Mexico in a trespass action brought by the United States in its own right and on behalf of an Indian tribe.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 731 F.2d 703. The relevant memorandum opinion and order of the district court (Pet. App. 8a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1984. The petition for a writ of certiorari was filed on July 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. In this action, the United States sought ejectment of petitioners from 11.8 acres of federally-protected tribal land and damages for petitioners' trespass. The United States

brought the action in its own capacity and as trustee for the Indians of the Santa Ana Pueblo, a tribal entity with respect to which the United States Bureau of Indian Affairs recognizes a trust responsibility. 46 Fed. Reg. 35360, 35362 (1981). The Pueblo lands, although owned in fee, are alienable only with the approval of the United States and the tribe is subject to the legislation of Congress enacted in the exercise of the government's guardianship over Indians and their property. *United States* v. *Candelaria*, 271 U.S. 432, 440 (1926); *Alonzo* v. *United States*, 249 F.2d 189, 196 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958). See Pet. App. 2a n.1.

2. While recognizing that the Eleventh Amendment does not apply to suits by the United States against a state, the district court nevertheless held that the Amendment barred the damage action. In the court's view, the United States could pursue the ejectment action but had insufficient interest in any money recovered from the State to maintain the claim for damages (Pet. App. 10a). On the assumption that the damage claim would have been barred by the Eleventh Amendment if brought by the Pueblo (Pet. App. 8a-9a), the court concluded that the United States cannot circumvent the Eleventh Amendment by bringing in its own name what is, in essence, a suit by the Pueblo against the State (Pet. App. 10a-11a). The district court reasoned that *United States* v. *Minnesota*, 270 U.S. 181, 195 (1926), was distinguishable because in that case the United States sought a monetary judgment to fulfull a treaty obligation, whereas here the action was not designed to vindicate any direct interest of the United States (Pet. App. 11a). In addition, the court suggested that the instant case differed from *Minnesota* because any monetary recovery would go directly to the Pueblo by virtue of the Pueblo's fee simple ownership of the land.

3. The court of appeals reversed. It held that *Minnesota* controlled the case and rejected the district court's attempts to distinguish it. The court observed that the award in *Minnesota*, as here, would have been paid out of the state treasury and would ultimately benefit the tribe (Pet. App. 4a-5a). Because the United States acted under its fiduciary obligation here, it did not matter that the ultimate beneficiary may be the Pueblo (*ibid*).

The court further held that there was no reasonable basis to distinguish the United States' duty to the Chippewas in *Minnesota* and its duty to the Pueblo in this case (Pet. App. 7a). The duty to the Pueblo is rooted in Congress' control and protection of Pueblo property, primarily through the Indian Trade and Intercourse Act, which guarantees Indian tribes' right of possession to tribal lands (Pet. App. 5a-6a). Finally, the court rejected the trial court's suggestion that the United States' obligation to the Pueblo is diminished because the Pueblo owns its property in fee simple (Pet. App. 7a). In so holding, the court relied on cases from this Court and the Tenth Circuit which have consistently rejected attempts to exclude Pueblo Indians from the benefits of federal protection generally applicable to tribal trust land which is owned in fee simple by the United States as trustee for the tribe (*ibid.*).

ARGUMENT

The court of appeals' decision is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. The right of the United States to bring an action for monetary damages against a state based on a federal duty to protect tribal lands was the exact issue presented in *Minnesota*. In that case, the United States sued to recover Indian land (or the value of land) which had been conveyed to the State in violation of federal law. The State argued that the

suit was essentially one brought by Indians, the real parties at interest and the beneficiaries of any recovery, and that the United States was only a nominal party — a "mere conduit through which the Indians are asserting their private rights." 270 U.S. at 193. Accordingly, it was submitted that the case against the State, properly treated as a suit by Indians who were citizens of Minnesota, was barred by sovereign immunity and otherwise outside this Court's original jurisdiction.[1] But this Court held that the United States had a direct interest in the matter arising "out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations and in both aspects the interest is one which is vested in it as a sovereign." *Id.* at 194. Although it was assumed the Indians could sue neither the United States nor the State, the Court concluded that the United States had the duty, and right, to sue the State. *Id.* at 194-195.

That proposition — that the Eleventh Amendment is no bar to an action by the United States against a state for the benefit of Indians — has been re-affirmed many times, most recently in *Arizona* v. *California*, No. 8, Orig. (Mar. 30,

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[1]It may well be that both these conclusions would be different today. As petitioners themselves point out, several courts, invoking this Court's decision in *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 472-475 (1976), have held that 28 U.S.C. 1362 now permits Indian Tribes to sue States directly. Pet. 6-7. So, also, it is now settled that the kind of claim presented in *Minnesota* and in the present case "arises under" federal law for jurisdictional purposes. *Oneida Indians Nation* v. *County of Oneida*, 414 U.S. 661 (1974). Finally, we do not suppose the Court today would disclaim power to entertain, on its Original Docket, a case within federal jurisdiction to which a State is a party, albeit the other parties are citizens of the same State. Cf. *California* v. *Southern Pacific Co.*, 157 U.S. 229, 261 (1895). Needless to say, however, none of these questions is presented here. For present purposes, we may assume that both *Minnesota* and this case were barred unless the United States was the proper plaintiff.

1983), slip op. 7-8, where the United States brought water rights claims on behalf of several tribes. The only question here is whether the present case is somehow exempted from the general rule. In our view, the court of appeals correctly rejected the asserted bases for distinguishing this suit.

2. This Court long ago repudiated any notion that the powers and duties of the United States touching the Pueblo Indians are any different than in the case of other Tribes, whether because the former own their lands in fee or otherwise. *United States* v. *Sandoval*, 231 U.S. 28 (1913); *United States* v. *Candeleria, supra; United States* v. *Chavez*, 290 U.S. 357 (1933). And the Court has likewise declined to distinguish between Indians whose land title is recognized by Act of Congress or Executive Order, rather than treaty. *Arizona* v. *California*, 373 U.S. 546, 595-597 (1963); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 133-134 n.1 (1982). The dispositive fact here is that the lands in question are protected by the Non-Intercourse Act, 25 U.S.C. 177, expressly made applicable by Section 7 of the Act of Feb. 27, 1851 (ch. 14, 9 Stat. 587), and by the Pueblo Lands Act of 1924 (ch. 331, 43 Stat. 63, amended by ch. 45, 48 Stat. 108 *et seq.*), which describes the United States as "guardian of said Pueblo Indians." At least in respect of their lands, the responsibilities of the United States in vindicating the Indian interest is no less in the case of Pueblo Indians and its standing to sue for that purpose is the same as for any other Indian tribe.[2]

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[2]The suggestion that the decision below is inconsistent with *United States* v. *Mitchell*, No. 81-1748 (June 27, 1983); 445 U.S. 535 (1980), is frivolous. As *Minnesota* expressly recognizes, "the fact that the Indians could not sue the United States for a failure to demand that a State surrender the lands or their value does not show that the United States owes no duty to the Indians in that regard." 270 U.S. at 195.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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